Notice Defense in New Mexico Workers' Compensation

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NOTICE DEFENSE IN NEW MEXICO WORKERS' COMPENSATION

The notice defense is an issue that arises frequently in workers' compensation cases. It is important because a worker's failure to provide the employer with timely notice of an accident may preclude recovery. The employer must also be wary because its ability to assert the defense depends on its own compliance with the statute.

The notice defense issue arises, in one way or another, in as many as one out of three workers' compensation cases handled at most law firms. It is one of the employer's primary defenses other than an injury not occurring in the course and scope of employment. A thorough understanding of the notice defense and the ways to overcome it are crucial to a successful workers' compensation practice. As early as the first client interview, an attorney should be cognizant of this often asserted defense because such awareness allows the attorney to ask an incoming client the proper questions. The answers to these questions provides the basis to predict whether the employer can assert this defense and the ways to overcome it.

The relevant statutory language appears in Section 52-1-29:

52-1-29. Notice of accident to employer; employer to post clear notice of requirement

> A. Any worker claiming to be entitled to compensation from any employer shall give notice in writing to his employer of the accident within fifteen days after the worker knew, or should have known, of its occurrence, unless, by reason of his injury or some other cause beyond his control, the worker is prevented from giving notice within that time, in which case he shall give notice as soon as may reasonably be done and at all events not later than sixty days after the occurrence of the accident. No written notice is required to be given where the employer or any superintendent or foreman or other agent in charge of the work in connection with which the accident occurred had actual knowledge of its occurrence.
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> B. Each employer shall post, and keep posted in conspicuous places upon his premises where notices to employees and applicants for employment are customarily posted, a notice that advises workers of the requirement specified in Subsection A of this section to give the employer notice in writing of an accident within fifteen days of its occurrence. The notice shall be prepared or approved by the director. The failure of an employer to post the notice required in this subsection shall toll the time a worker has to give the notice in writing

specified in Subsection A of this section up to but no longer than the maximum sixty-day period.

C. The notice required in Subsection B of this section shall include as an attachment to it a preprinted form, which shall be approved by the director, that allows the worker to note and briefly describe the accident and sign his name. The employer, any superintendent or foreman, or any agent of the employer in charge of the work where the accident occurred shall also sign the preprinted form that describes the accident. That signature shall not be a concession by the employer of any rights or defenses. It merely acknowledges receipt by the employer or his agent of the form signed by the worker. The preprinted form shall be prepared in duplicate so that both the worker and the employer can retain copies.

52-1-29 NMSA (1978)

As provided above, subsection A states that an employee must give the employer written notice of the accident within 15 days of when the worker knew or should have known of the accident. Actual knowledge can substitute for the written notice requirement. Subsection B requires that an employer post, in a prominent location, a poster from the Workers Compensation Administration explaining to employees that they must provide their employer with 15 days notice. This section tolls the period by which a worker must give notice up to 60 days if the employer fails to post the required notice. Lastly, subsection C requires that the poster be accompanied by a preprinted form to allow a worker to provide notice of the accident.

Much case law has developed interpreting this statute, which has been repealed and amended (formerly 59-10-13.4, 1953 Comp.), and although some of the language of the statute has changed, the case law outlined below is still applicable today.[1]

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[1] A couple of the relevant differences between the current, amended, and repealed notice statutes appear

This paper will briefly explain the purpose of the notice requirement and its status as an affirmative defense. Then it will discuss the major case law interpreting subsection A including what constitutes actual knowledge that will substitute for written notice, how latent injuries effect the time for giving notice, and how the worker's knowledge of a compensable injury effects the time for giving notice. Lastly, this paper will address the requirements under subsections B and C that the employer post the laws regarding workers' compensation and attach to it a preprinted notice form.

I. PURPOSE OF THE NOTICE REQUIREMENT

The purpose of the notice requirement is to protect the employer by enabling it to investigate the facts and circumstances of the worker's claimed injury while the facts are still accessible. The requirement protects employers from false or exaggerated claims and allows an employer to ensure that the employee receives proper medical attention to speed up the recovery process. *Grine v. Peabody Nat. Res.*, 140 N.M. 30, 40, 139 P.3d 190, 200 (N.M. 2006) (citing *Herman v. Miner's Hosp.*, 111 N.M. 550, 555, 807 P.2d 734, 739(N.M. 1991)).

II. LACK OF NOTICE IS AN AFFIRMATIVE DEFENSE

The failure of an employee to provide timely notice is a complete bar to obtaining workers' compensation benefits. *Geeslin v. Goodno, Inc.*, 75 N.M. 174, 402 P.2d 156 (N.M. 1956). Notice of an accident is not an essential element of the worker's case that must be pleaded and proved by the

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under current Subsection A where the period of notice has changed from 30 to 15 days and the requirement that the employee provide notice of an "accident and an injury" has changed to require notice of an "accident." The effect of this latter change has not effected the tolling of latent injuries. *See infra* Part IV(discussing *Garnsey v. Concrete Inc. of Hobbs*, 122 N.M. 195, 922 P.2d 577 (N.M. Ct. App. 1996), *cert. denied* 122 N.M. 112, 921 P.2d 308 (N.M. 1996)).

worker under the statute, but it is a condition precedent to the worker's right to recover. *See e.g., Beyale v. Ariz. Pub. Serv. Co.*, 105 N.M. 112, 729 P.2d 1366 (N.M. Ct. App. 1986).

The lack of notice is considered an affirmative defense in that the employer must raise it initially. If the **employer places notice in issue**, however, the **worker has the burden to prove** such notice was given. *Id.* at 114, 729 P.2d at 1368. Workers are assumed to have given proper notice unless the employer specifically denies it.

III. ACTUAL KNOWLEDGE AS A SUBSTITUTE FOR WRITTEN NOTICE

Where an employer has actual knowledge of an accident, written notice is not required. 52-1-29 NMSA (1978). In order to meet the actual knowledge requirement, the employer must have knowledge that a work-related accident caused the injury. *Herman v. Miners' Hosp.*, 111 N.M. 550, 555, 807 P.2d 734, 739 (N.M. 1991) (citing *Herndon v. Albuquerque Pub. Sch.*, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978); 2B A. Larson, *The Law of Workmen's Compensation* § 78.31(a)(2)). In other words, the employer must have knowledge of the injury and "'some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.'" *Id.* (quoting 2B A. Larson, *supra*, § 78.31(a)(2) at 15-133 to -136).

Actual knowledge can take the form of the employer directly observing the accident or its consequences, but the employer does not necessarily need to have first-hand knowledge. Also verbal reporting can sometimes confer actual knowledge such that written notice is not required. The standard stated above to establish actual knowledge, though, makes clear that mere knowledge and knowledge obtained through casual conversations are insufficient. The cases below illustrate these points.

A. First-Hand Observation Not Required

Employers used to argue that the only knowledge that would relieve a worker from the written notice requirement was first-hand knowledge. The following early cases established that verbal reporting that gives the employer actual knowledge is sufficient without the employer having to witness the accident itself.

In *Lozano v. Archer*, 71 N.M. 175, 178, 376 P.2d 963, 965 (N.M. 1962) the employee had hurt his back while lifting heavy equipment at work and had hurt his foot when a customer dropped a 95 pound coil on it. He promptly reported both accidents to the office manager, and she referred him to a doctor for treatment. The employer argued that the employee's workers' compensation claim was barred for failure to provide notice in writing. The employer was essentially arguing that the only knowledge that would relieve the employee from the written notice requirement was if the injury occurred in the employer or his agent's presence. The court rejected that argument holding that under these circumstances, verbal reporting of an accidental injury to the employer arising out of and in the course of employment satisfied the requirement of actual knowledge. *Id.* at 179, 376 P.2d at 966.

In *Baca v. Swift & Co.*, 74 N.M. 211, 392 P.2d 407 (N.M. 1964), the employee reported his accident to his supervisor and was referred to a doctor who found an acute lumbo-sacral strain. The employer admitted to having notice but claimed that written notice was still required. The court pointed out that written notice is not required where "the employer . . . had actual knowledge of the occurrence." *Id.* at 216, 392 P.2d at 410 (citing 59-10-13 NMSA (1953) (since repealed)). The court stated that it is "committed to the doctrine that the verbal reporting of the accident and injury to the employer or his agent under the circumstances shown here, satisfied the requirement of written

notice or actual notice in the statute." *Id.* (citing *Lozano*, 71 N.M. 175, 376 P.2d 963; *Winter v. Robertson Constr. Co.*, 70 N.M. 187, 372 P.2d 381 (N.M. 1962); *Buffington v. Continental Cas. Co.*, 69 N.M. 365, 367 P.2d 539 (N.M. 1961)).

B. Verbal Reporting, In Itself, Not Determinative

Verbal reporting by an employee who suffered a work related injury may constitute actual knowledge as the cases above indicate, but the court in *Marez v. Kerr-McGee Nuclear Corp.* stated that the fact that a verbal report has been made is not, in itself, determinative. *Marez v. Kerr-McGee Nuclear Corp.*, 1978, 93 N.M. 9, 595 P.2d 1204, *cert. denied* 92 N.M. 532, 591 P.2d 286 (citing 1953 Comp. §§ 59-10-13.4, 59-10-13.4, subd. B) (Lopez, J., with one Judge specially concurring). Simply because a verbal report is made does not necessarily mean that the employer has actual knowledge. The courts will consider the detail and specificity of the verbal report, which connects the injury to the workplace.

In *Marez*, the worker hurt his back opening and closing a vulcanizer door on April 11, 1977. He continued to work for 2 days and then he did not return until May 2, 1977. When he returned he specifically told his employer that opening the vulcanizer door and the bending and climbing that it required caused him to have pain, and he testified that he told his employer that such pain was the reason he took time off. In response, his supervisors gave him lighter work. The court stated that the worker gave the best notice he could by describing the activities that had caused his pain. The supervisors understood the meaning of this notice because they gave him lighter work. The court found that under these circumstances, the worker's verbal report provided the employer with actual knowledge. *Id.* at 1210.

Sometimes, however, verbal reports are insufficient to satisfy the actual knowledge requirement and the next two sections discuss the common ways in which verbal reports do not confer actual knowledge.

C. Mere Knowledge Insufficient

The employer's mere knowledge of an injury, without any causal connection to a work accident, cannot be considered actual knowledge within the meaning of the statute. As a very general example, if a worker told his supervisor, "My back hurts," that alone would not constitute sufficient notice of an accident. The statement, "My back hurts because I lifted the steel beam yesterday," would likely be sufficient notice. The principle is illustrated in the case below.

In *Wilson v. Navajo Freight Lines*, 73 N.M. 470, 389 P.2d 594 (N.M. 1964), the employer was aware that the employee had suffered a heart attack and was hospitalized while on a long haul truck delivery, but that knowledge alone did not establish that the injury was related to work. The court stated that heart attacks suffered in the course of employment due to exertion can be compensable accidental injuries, but every heart attack that occurs when a person is on the job is not accidental and compensable. To establish a right to workers' compensation, there must be a finding of a causal connection between the work and the heart attack based on substantial evidence. *Id.* at 473, 389 P.2d at 596 (citing *Sanchez v. Bd. of County Comm'rs*, 63 N.M. 85, 313 P.2d 1055 (N.M. 1957); *Yates v. Matthews*, 71 N.M. 451, 379 P.2d 441 (N.M. 1963)). The court concluded that mere notice to the employer that the employee became sick while at work cannot be considered actual knowledge within the statute. *Id.*

Contrast *Herman v. Miners' Hospital*, 111 N.M. 550, 555, 807 P.2d 734, 739 (N.M. 1991), in which the court upheld a finding that the hospital had actual knowledge of a work-related accident

suffered by a nurse. The nurse's heart attack occurred at work and the nurse was treated and died there, but knowledge of the injury alone was not determinative. Instead, the worker presented evidence that the hospital knew of her stressful schedule, including her forty-hour work week, being on call an additional 80 hours a week, attending school, involvement in merger plans, and additional testimony of an argument with a surgeon on the date of her death. The substantial evidence of her work-related stress established the causation necessary for actual knowledge. *Id.*

D. Casual Conversations Insufficient

Just as mere statements of an injury do not provide actual knowledge, neither do casual conversations. In *Ogletree v. Jones*, 44 N.M. 567, 106 P.2d 302 (N.M. 1940), the employee who was diagnosed with gas poisoning, stated to his employer in a casual conversation when he went to get his paycheck that he "was about knocked out" from the gas in his chest, and after his employment ended he told the foreman that he was "kind of knocked out" though he did not say from what. The only evidence the worker had of actual knowledge was found in the brief conversations outlined above. The court stated that "[n]otice in casual conversations is insufficient," *id.* at 305 (quoting *Herbert v. L.S. etc., Ry. Co.*, 200 Mich. 566, 166 N.W. 923), and it held that notice cannot be imputed from slight and unsatisfactory circumstances. *Id.* at 306. This holding by the court is consistent with the principal that mere knowledge is insufficient. Casual conversations are insufficient because they may provide even less than mere knowledge of an injury.

Whether an employer has actual knowledge is determined by considering all the facts and circumstances in a case. *Grine v. Peabody Nat. Res.*, 140 N.M. 30, 40, 139 P.3d 190, 200 (N.M. 2006); *Powers v. Riccobene Masonry Const., Inc.*, 97 N.M. 20, 24, 636 P.2d 291, 295 (N.M. Ct. App. 1980). The cases above which discuss verbal reporting, mere knowledge, and casual conversations

indicate that the courts' determinations as to whether the employer had actual knowledge is indeed heavily dependent on the facts and circumstances. Successful plaintiffs presented sufficient evidence to prove that the employer had actual knowledge by connecting the injury or illness to the workplace.

E. Actual Knowledge is Subject to Statutory Time Limits

Even though Section 52-1-29(A) allows actual knowledge to substitute for the written notice requirement, actual knowledge must still fall within the time period required to provide written notice. *Rohrer v. Eidal Int'l*, 79 N.M. 711, 449 P.2d 81 (N.M. Ct. App. 1968). In the *Rohrer* case, the only means by which the employer obtained actual knowledge was by the verbal notice the worker provided. The verbal notice was not provided until thirty-four days after the accident so the court ruled that this was insufficient to charge the employer with actual knowledge. *Id.* at 714, 449 P.2d at 84. The time frame to provide actual knowledge is the same as the time frame for written notice because, otherwise, actual knowledge would become a convenient way to circumvent the time limits in the statute. *See id.*

Under the current workers' compensation law, an injured worker must provide the employer with written notice of the accident within fifteen days, unless the worker is unable to, in which case the worker should give notice as soon as possible, but no later than sixty days after the accident, and actual knowledge is an exception to the written requirement. *Grine*, 140 N.M. at 39, 139 P.3d 199. Actual knowledge only substitutes for written notice when such actual knowledge is obtained within the same time designated for written notice. *Rohrer*, 79 N.M. at 714, 449 P.2d at 84.

IV. LATENT INJURIES TOLL THE TIME FOR GIVING NOTICE

Another significant part of the notice defense is latent injuries. A latent injury is an injury in which a worker is unaware of the relation of the injury to the work, i.e., the worker experiences some

kind of discomfort but he does not tie it to a work-related injury. That is frequently the case with carpal tunnel, i.e., repetitive stress-type injuries. Section 52-1-29(A) allows the employee to report latent injuries within 15 days of when the worker **knew or should have known of its occurrence**.

In *Garnsey v. Concrete Inc. of Hobbs*, 122 N.M. 195, 922 P.2d 577 (N.M. Ct. App. 1996), *cert. denied* 122 N.M. 112, 921 P.2d 308 (N.M. 1996), the worker hurt his neck while attempting to open the hood of a truck on July 14, 1994. The only pain he experienced was cramping which lasted half an hour after the initial discomfort. The next day he started experiencing numbness and heaviness in his arm, shoulder, and hand which he did not connect to the initial neck pain. Instead he attributed the discomfort to driving the truck. The pain got worse and the worker began taking five to eight aspirin every few hours. He finally went to the doctor on August, 11, 1994, and on August 17th the doctor told the worker that he might have a pinched nerve in his neck. That was the first time that the worker began thinking that his pain was associated with the hood incident. On August 24th, a specialist diagnosed him with a herniated disk in the neck and he had surgery the next day. The worker finally provided written notice to his employer on August 29th. The worker testified that he never associated his arm pain with the hood incident. The employer argued that the newly amended Section 52-1-29(A) required that the worker provide notice within 15 days of the occurrence, which was the hood incident. Alternatively, if the court construed Section 52-1-29(A) as allowing the tolling of latent injuries, this was not a latent injury since the worker had pain on the day of the incident.

The courts have always interpreted that the clock did not start ticking until the worker knew, or should have known by the exercise of reasonable diligence, that he had a compensable injury. *Id.* at 198, 922 P.2d 580 (citing *Gomez v. B.E. Harvey Gin Corp.*, 110 N.M. 100, 102, 792 P.2d 1143, 1145 (N.M. 1990); *Martinez v. Darby Constr. Co.*, 109 N.M. 146, 149, 782 P.2d 904, 907 (N.M.

1989). Section 52-1-29(A), which was amended from requiring that the employee provide notice "of the accident and of the injury" to notice "of the accident" is interpreted in the same way; it allows an employee to provide notice of all latent injuries within the statutory time period of when the employee knew or should have known, by reasonable diligence, that a compensable injury had occurred. A cursory reading of the statute supported the employer's interpretation that notice was required within 15 days of the accidental occurrence, without regard to whether the injury was evident at the time, but such an interpretation would create an absurd result, requiring workers to give notice of incidents that could potentially cause injury. *Id.* at 197-98, 922 P.2d at 579-80. The court ruled that the notice was timely given because the worker had a latent injury which was not discoverable until August 17th, 1994. *Id.* at 200, 922 P.2d at 582.

In the case of *Flint v. Town of Bernalillo*, 118 N.M. 65, 878 P.2d 1014 (N.M. Ct. App. 1994) a police officer witnessed a woman shoot herself on May 28, 1986. He began having relationship difficulty and difficulty at work. The officer received some psychological tests in 1990 and the doctors determined that he was fit for duty. The officer went to fight in the Gulf War and experienced recurring dreams of the 1986 shooting incident. When he returned from war his disciplinary problems at work became worse. He was placed on administrative leave on September 9, 1991 and went to the VA hospital on September 17, 1991 where he was diagnosed with PTSD caused by the 1986 shooting. The officer provided written notice to his employer on November 12, 1991, but testified that the employer had actual knowledge in September 1991. The court stated that the time period to provide notice begins to run in the case of a latent injury when the worker knows or should know, by exercise of reasonable diligence, that he incurred a compensable injury. *Id.* at 67, 878 P.2d at 1016. In this case, the statutory notice period began to run when the officer was

diagnosed with PTSD, rather than earlier when the injury began interfering with his work back in 1987 and 1988. Even though the officer was aware of his behavioral issues, the record did not support a finding that he knew or should have known that his issues were related to work. *Id.* at 69, 878 P.2d at 1018.

Both the *Garnsey* and *Flint* cases confirm that under Section 52-1-29(A), when a worker has a latent injury, the time for giving notice begins to run when the worker becomes aware of the relationship between the injury and the work.

V. WORKER'S KNOWLEDGE OF COMPENSABLE INJURY TRIGGERS TIME FOR GIVING NOTICE

Sometimes workers have an injury at work, which they do not know the seriousness of, and they do not report it. They continue to go to work and the pain gets worse, eventually becoming so unbearable that the worker has to stop working. In such situations, there is a point at which the injury becomes serious enough that the worker is charged with knowledge of a compensable injury triggering the statutory time period in which to provide notice. Section 52-1-29(A) requires written notice to the employer within 15 days of when the worker **knew or should have known of its occurrence**. Under such circumstances, courts have interpreted that notice does not run from the date of the injury but from the date the worker has knowledge of a compensable injury. The court in *Gomez v. B.E. Harvey Gin Corp. and Employers Casualty Co.*, 110 N.M. 100, 792 P.2d 1143 (N.M. 1990) discussed the level of knowledge needed to trigger the statutory period of giving notice.

In *Gomez*, the worker injured his lower back on December 14, 1988 while working as a laborer at a cotton gin. His pain was immediate, but he completed his work that day. He went to the emergency room that evening and an x-ray revealed nothing abnormal. The doctor diagnosed him as having a strained back and sent him home with pain medication. The worker did not go to work the

next day, but thereafter returned to work and worked in continual pain until January 27, 1989. The pain became so severe that the worker went to the hospital on February 3rd, where an x-ray indicated disc bulge at L-5, S-1. The date of his first notice to his employer was January 31, 1989. *Id.* at 102, 792 P.2d at 1145.

His claim was denied at the initial hearing for failing to give proper notice. The New Mexico Supreme Court stated that the time for giving notice begins to run when the employee knows, or should know by the exercise of reasonable diligence, that he sustained a compensable injury. *Id.* (citing *Martinez v. Darby Constr. Co.*, 109 N.M. 146, 149, 782 P.2d 904, 907 (N.M. 1989)). An actual disability is not required, only that the worker more likely than not is impaired or unable to perform the job. *Id.* The court stated that the level of knowledge that would trigger the statutory notice period "requires a worker to recognize the nature, seriousness, and probable compensable character of the injury." *Id.* The worker may only recognize this after losing the ability to perform regular job duties, notwithstanding the fact that some time has elapsed from the date of the original incident during which the worker was able to perform his usual tasks while having pain. *Id.* (citing *Sedillo v. Levi-Strauss Corp.*, 98 N.M. 52, 644 P.2d 1041 (N.M. Ct. App.), *cert denied* 98 N.M. 336, 648 P.2d 794 (1982).

The court noted that when people suffer back pain, they are hopeful that it will go away. In this case, the worker went to the ER and the doctor found nothing abnormal, so he continued to work. When the pain finally became so severe that he could not perform his job, the worker realized he had a compensable injury. The worker's belief was not unreasonable so the facts did not support a finding that the worker knew or should have known before January 27th that he had a disabling,

compensable injury. The court concluded that notice to the employer on January 31st was timely and benefits should have been granted. *Id.*

In order for a worker to be statutorily required to provide notice under Section 5-1-29(A), he must be charged with knowledge of a compensable injury. *See Anaya v. Big Three Indus.*, 86 N.M. 168, 521 P.2d 130 (N.M. Ct. App. 1974). The *Anaya* court stated in defining a compensable injury that compensation is only paid when there is a disability and disability is defined in terms of the inability to perform the usual tasks of employment for which the worker is fitted. Unless the worker has a basis to assert a compensable claim, i.e., some type of missed work, there is no basis to trigger the notice requirement under Section 52-1-29(A). *Id.* at 170-71, 521 P.2d at 132-33. Therefore, a worker who does not have a cognizable disability is not charged with having to provide notice until he would know he has a compensable injury. The time to give notice does not begin until a reasonable worker would appreciate the seriousness of the injury.

VI. EMPLOYERS MUST POST NOTICE

Under Section 52-1-29(B) each employer is required to post in a visible location, where notices are normally posted, a notice that tells workers of the requirement to provide written notice of an accident within 15 days. Such notices can be obtained directly from the Workers Compensation Administration or must be approved by the director. If the employer does not post the notice, the time that a worker has to give notice of an accident is tolled up to a maximum of 60 days.[2]

VII. PREPRINTED FORM MUST BE ATTACHED TO NOTICE

The notice described in subsection B must have attached to it a preprinted form, approved by the director, that allows the worker to note and describe the accident and sign his name. 52-1-29(C)

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[2] *See* 52-1-29(B) NMSA printed on p. 4.

NMSA. The form must be prepared in duplicate so that the worker and employer can retain copies.[3]

The New Mexico Administrative Code reiterates and expands upon the requirements set out in Sections 52-1-29(B) and (C). The relevant regulatory language appears below:

11.4.2.10 Accident Notice Posters and Accident Notices

> A. Every employer shall post and keep posted in conspicuous places on its business premises, in areas where notices to employees and applications for employment are customarily posted, an accident notice poster stating the requirement that workers notify employers of accidents. The accident notice poster is available at the WCA at no charge to the employer on a form approved by the director.
>
> B. Every employer must keep attached to the accident notice poster an adequate supply of notice of accident forms approved by the director.
>
> C. Any employer may submit to the director a proposal for approval of a notice of accident form or accident notice poster. No form shall be approved except in writing, signed by the director.

11.4.2.10 NMAC

VIII. EMPLOYER'S FAILURE TO COMPLY WITH POSTING TOLLS TIME FOR GIVING NOTICE

The statute and the regulations clearly provide that an employer must post accident notice posters in a visible location, and notice of accident forms must be attached to those posters. If the employer fails to do either or both, the time period for a worker to provide notice is extended up to 60 days. Posting the accident notice poster without the notice of accident forms attached is insufficient and will extend the time for notice 60 days. For example, posting accident notice posters but placing the notice of accident forms in a separate inaccessible location, such as a locked desk drawer will not satisfy the requirement. Employers sometimes forget this requirement and it is a simple way for the worker to extend his time for giving notice.

IX. CONCLUSION

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[3] *See* 52-1-29(C) NMSA printed on p. 4.

The multitude of cases over the years indicate that employers frequently utilize the notice defense, arguing that workers failed to provide timely notice of an accident. Other than an accident occurring outside the course and scope of employment, lack of notice is the most frequently asserted defense. It completely bars a worker from recovering under workers' compensation. No wonder it is so popular and so important for attorneys who represent workers.

The frequency with which the notice defense is litigated has revealed that the defense arises not in unexpected ways. First, it arises when the worker has failed to provide written notice; in which case, actual knowledge can substitute for written notice. It is important to reemphasize that actual knowledge requires more than mere knowledge or casual conversation, but requires the injury be connected to the work. In latent injury cases, the time period to provide notice does not start to run until the worker was aware of the relationship between the injury and work. And when a worker continues to work despite an injury, the time for notice does not begin to run until a reasonable worker can appreciate that the seriousness of the injury makes it compensable.

Employers at times fail to comply with the statute by not providing adequate notice to employees in the form of the required WCA posters. Importantly, and what employers neglect the most, is the requirement that the accident notice form be attached to the poster. Remember that notice forms locked in a filing cabinet will toll the notice period.

As the notice defense replays itself over and over again in common scenarios in workers' compensation cases, attorneys who understand it will find themselves able to anticipate and overcome the defense.